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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Case No.....

NEIL W. GILLIES,

Petitioner,

-vs-

AERONAVES DE MEXICO, S.A.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Certiorari jurisdiction has not been invoked.

Petitioner contends the decision sought to be reviewed herein is in conflict with *Wood & Selick v. Compagne Generale Transatlantique*, 43 F. 2d 941 (CA 2nd, 1930), a Second Circuit case decided in 1930. Pretermitting the soundness of his contention, petitioner has failed to inform the Court that the cited case is no longer followed by the Second Circuit[1] and, consequently, is not a jurisdictional predicate for review.

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[1]*In Bournias v. Atlantic Maritime Co., Ltd.*, 220 F. 2d 152 (CA 1955), the Second Circuit considered and rejected the *Wood* test for determining whether a foreign statute of limitation was substantive or procedural.

Petitioner also contends that the decision sought to be reviewed herein, which holds that the lapsing provisions of the Mexican Labor Law are substantive and therefore conclusive of the petitioner's claim for benefits thereunder, is contrary to the public policy of the State of Florida. This contention appears to rest on the fallacious premise that a Florida statute,[2] which voids any contract fixing a shorter period of limitation for its enforcement than is provided by the applicable Florida statute of limitation, can somehow invalidate substantive lapsing provisions contained in the controlling Mexican Labor Law. Obviously, such a premise can not invoke the certiorari jurisdiction of this court.

QUESTIONS PRESENTED

I.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND THEREFORE CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA, LAW WHICH BARRED PETITIONER'S CLAIM?

II.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE

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[2]Florida Statute 95.03.

AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA?

STATUTORY PROVISIONS INVOLVED

THE MEXICAN FEDERAL LABOR LAW

Article 328. *Rights to recourse which may arise from this Law* or from the collective or individual labor contract shall lapse in *one year, except in the cases covered by the following Articles.*

Article 329. The following shall lapse in *one month:*

* * *

III. Rights granted to workers by Section XXII of Article 123...

Section XXII. An employer who dismisses a worker without justifiable cause . . . shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages . . .

Article 125.—The compensations mentioned in the foregoing Article shall consist of:

I. Three months' wages.

II. If the work relation should be for a specific period of time not exceeding one year: a sum equal to the wages payable for one-half the period that services were rendered. If exceeding one year: a sum equal to six months' wages for the first year and equivalent to twenty days' wages for each following year during which services were rendered.

If the work relation was for an indefinite period, the indemnity shall consist of twenty days' wages for each year's service.

III. The amount of the unearned wages for the period elapsing from the date of dismissal until the indemnities mentioned in the two foregoing Sections have been paid.

STATEMENT OF THE CASE

The petitioner, a resident of Florida, sued the respondent, the national airline of the Republic of Mexico, in the Circuit Court of Dade County, Florida and the cause was removed to the United States District Court, Southern District of Florida, on the basis of a diversity of citizenship between the parties. Petitioner sought benefits and indemnities under the Mexican Labor Code, claiming that he was terminated from respondent's employ without cause. Respondent denied this allegation and asserted that any claim petitioner might have had was barred by the lapsing provisions of the Mexican Labor Code.

The case was tried before the District Court without a jury, and upon the evidence presented, the trial court found for the petitioner, and in so doing determined that the petitioner's cause of action arose in the State of Florida; that the petitioner was terminated without justifiable cause; and that the petitioner was entitled to the benefits of the Mexican Labor Law. The trial court further found that the issue of limitations was procedural and not substantive, and that the Florida statute applied rather than the lapsing provisions of the Mexican Labor Law.

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial Court, holding the lapsing provisions of the Mexican Labor Law to be substantive and applicable to petitioner's claim. Consequently,

the appellate court ruled that petitioner's claim should have been denied.

This proceeding ensued.

ARGUMENT

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND THEREFORE CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA LAW WHICH BARRED PETITIONER'S CLAIM?

No.

The appellate court properly held that the lapsing provisions of the Mexican Labor Law were substantive and constituted a bar to petitioner's claim.

In support of his argument under this point, petitioner relies entirely upon the Second Circuit case of *Wood & Selick*, supra. He erroneously contends that Florida would follow the test enunciated therein for determining whether the lapsing provisions of the Mexican Labor Law were substantive or procedural. Here again, petitioner overlooks the fact that the *Wood* test was later rejected by the Second Circuit in *Bournias*, supra., as follows:

> "And we do not think that it should matter whether . . . the foreign practice requires that limitation be placed, *Wood & Selick*, supra. 'The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discus-

> sions. It has all the tenacity of original sin and must constantly be guarded against.' Cook, Substance and Procedure in the Conflict of Laws, 42 Yale L.J. 333, 337 (1933). No more should it matter whether the foreign right is extinguished altogether by the mere passage of time, or is instead only repressed into a dormant state, subject to 'revival' if the defense of limitation is waived or renounced, *Wood & Selick*, supra. Such a distinction would generally be difficult to apply, and might also lead to results out of the pattern of the precedents; that is, if the defense could be waived under foreign law, a limitation period might be considered 'procedural' even though it was contained in a specific statute giving a remedy for wrongful death. Such limitations, however, are almost invariably held 'substantive.' Restatement of Conflict of Laws §397." 220 F.2d 156.

After rejecting all other tests, the Second Circuit in *Bournias* determined that the *specificity*[3] test should be applied:

> "Which, then, of these various tests should be applied here? It appears to us that it should be the one which *Davis v. Mills*, . . . suggests . . . ."
>
> * * *
>
> "We conclude, therefore, that the 'specificity' test is the proper one to be applied in a case of this type, without deciding, of course, whether the same test would also be controlling in cases involving domestic or other kinds of foreign statutes of limitations.
>
> Applying that test here it appears to us that the libelant is entitled to succeed, for the respondents

[3]Emphasis ours unless otherwise noted.

have failed to satisfy us that the Panamanian *period of limitation in question was specifically aimed against the particular rights* which the libelant seeks to enforce. The Panama Labor Code is a statute having broad objectives, viz.: 'The present Code regulates the relations between capital and labor, placing them on a basis of social justice, so that, without injuring any of the parties, there may be guaranteed for labor the necessary conditions for a normal life and to capital an equitable return for its investment.' In pursuance of these objectives the Code gives laborers various rights against their employers. *Article 623 establishes the period of limitation for* all *such rights, except certain ones which are enumerated in Article 621*. And there is nothing in the record to indicate that the Panamanian legislature gave special consideration to the impact of Article 623 upon the particular rights sought to be enforced here, as distinguished from the other rights to which that Article is also applicable. *Were we confronted with the question of whether the limitation period of Article 621 (which carves out particular rights to be governed by a shorter limitation period) is to be regarded as 'substantive' or 'procedural' under the rule of 'specificity' we might have a different case; but here on the surface of things we appear to be dealing with a 'broad,' and not a 'specific,' statute of limitations.*" 220 F.2d 156, 157.

This statement by the court in *Bournias* invites a discussion of two points, both of which are dispositive of this controversy.

First, the case at bar is the "different case" referred to in the cited case. Specifically, the relevant provisions of the

Mexican Labor Law, as contemplated by *Bournias*, prescribe different periods of limitation. The longer period of limitation ,which is the Mexican counterpart to Article 623 of the Panamanian Labor Code, is found in Article 328, as follows:

> "Article 328. *Rights to recourse which may arise from this Law* or from the collective or individual labor contract *shall lapse* in *one year, except in the cases covered by the following Articles.*"

Similarly, the shorter limitation period found in Article 621 of the Panamanian Labor Code is mirrored by Article 329 of the Mexican Labor Law *(which carves out particular rights to be governed by a shorter limitation period)*, as follows:

> "Article 329. The following shall lapse in *one month:*
>
> • • •
>
> III. Rights granted to workers by Section XXII of Article 123. . ."

Section XXII of Article 123 provides that:

> "XXII. An employer who dismisses a worker without justifiable cause . . . shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages . . ."

Thus, it plainly appears that in our case, we do have, as contemplated by the court in *Bournias*, a provision "which carves out particular rights to be governed by a shorter limitation period". And that, we submit, deems our lapsing provision substantive.

We pause here to point out that the decision in *Bournias* and the decisions of the Florida courts are in concord.

Florida follows the traditional rule that a statute of limitation is procedural for the purposes of choice of law and that the forum's statute of limitation generally applies to a cause of action arising under the laws of a foreign jurisdiction. However, Florida has long recognized the exception that when an entirely new right of action is created by statute, and the same statute provides the limitation of time within which the action must be brought, then:

> [s]uch a limitation of time is not like an ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to lapse without the institution of the action, such right of action becomes extinguished and is gone forever. *Fowler v. Matheny*, 184 So.2d 676, 677 (Fla. 4th Dist. 1966).

In *La Floridienne, J. Buttgenbach Co. v. Seaboard Air Line Ry.*, 52 So. 298 (1910) the Supreme Court of Florida quoted with approval from the case of *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 996, as follows:

> "In Stern v. La Compagine Generale Transatlantique (D.C.) 110 Fed. 996, it was held that, *where a statute gives a right of action for wrongful death, 'provided that every such action shall be commenced within 12 calendar months after the death of such deceased person,' such proviso was not merely a designation of the ordinary period of limitation for such actions,* operating as a part of the general statute of limitations of the state, on the remedy alone, and hence subject to extension under a provision of such general statute when the defendant was not a resident of the state, and having an action to enforce the right given when

> brought in another jurisdiction, to be governed by the law of the forum as to limitation, *but was an express condition of the right of action itself, which must be given effect in every forum wherein an action based upon the statute is instituted.* Thompson v. Hoxsie, 25 R.I. 377, 55 Atl. 930; *The Harrisburg,* 119 U.S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; 19 Am. & Eng. Ency. Law, p. 151."

Similarly, in *Bowery v. Babbit,* 128 So. 801 (1930), the Supreme Court of Florida said:

> "In handing down the opinions which we have just referred to, this Court doubtless had in mind that line of decisions which holds that where a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. Cases cited . . . In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right. *The Harrisburg,* supra; *Davis v. Mills,* 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067."

In *The Harrisburg,* 119 U. S. 199 (1886), a libel in admiralty for wrongful death where the limitation set forth in the appropriate state statute had run and there was no recognized federal right of action for wrongful death, the Supreme Court reversed a finding for the plaintiff and ordered that suit dismissed.[4] In so doing, the Court

[4]In *Moragne v. States Marine Lines.* 398 U. S. 375 (1970), *The Harrisburg* was overruled insofar as it held that there was no cause of action in admiralty for wrongful death due to negligence. The vitality of that portion of the holding cited here, however, continues unabated.

held at p. 215 that:

> The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.

Some years later the Court faced a similar issue when they were asked to apply the *Harrisburg* rule to a limitation which was enacted subsequent to the enactment of the statute creating the right to which the limitation purportedly attached. In *Davis v. Mills*, 194 U. S. 451 (1904), the Court, in applying the Harrisburg rule to the limitation, enunciated the test of *specificity*, as follows:

> "The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so *specifically* as to warrant saying that it qualified the right."

The Court speaking through Justice Holmes then held that:

> The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident. If the laws of Montana [the state whose statute was in issue] can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. 194 U.S. 457.

Accord: Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970); *Gaston v. B. F. Walker, Inc.*, 400 F.2d 617 (5th Cir. 1968); *Kenney v. Trinidad Corp.*, 349 F.2d 832 (5th

Cir. 1965); *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959); *Ford, Bacon & Davis v. Volentine*, 64 F.2d 800 (5th Cir. 1933).

Florida's adherence to the *specificity* test fashioned by the Court and followed by the Fifth Circuit and Second Circuit is dispositive of this controversy.

Recalling that under that test the limitation period is deemed substantive if it is *specifically* directed to the liability so as to warrant saying that it qualifies the right, Petitioner has made what must be regarded as a concession fatal to his position herein:

> ". . . the lapsing provisions contained in Article 329, sub-section (III), *specifically* limit the rights of the worker contained in Article 123 of the 1931 Act . . ."[5]

Consistent with the record and petitioner's own view of it, the appellate court found that:

> "The employee's right is created by the Law, the period of limitations is contained in the Law, and the lapsing period is specifically made applicable to employees in Gillies' situation."

Thereupon, the appellate court correctly concluded that:

> "The Mexican limitation period should have been applied. Under it Gillies' claim had lapsed. The district court should have denied recovery."

SECOND QUESTION

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY

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[5]Page 31 of petitioner's brief filed in the appellate court.

DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA?

No.

The appellate court correctly held that the lapsing provisions of the Mexican Labor Law were substantive and, consequently, applicable to petitioner's claim for benefits thereunder.

Undaunted by the evident correctness of that holding, petitioner nevertheless says that the ruling contravenes the public policy of Florida as expressed by Florida Statute 95.03:

> "All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Petitioner's argument is bad for several reasons. First, the statute just quoted, by its very terms, is applicable to a *contract*.[6] It is not, by any strained interpretation thereof, applicable to a substantive statute of limitation contained in a controlling foreign law.

Petitioner virtually concedes this by his purposeful transformation of what was, at the time of its commence-

ment, simply a claim for benefits under the Mexican Labor Law to an action predicated upon an alleged breach of an employment contract. This effort provides, at most, an illusory nexus between the statute petitioner seeks to invoke and the nature of the action declared upon. No real connection between petitioner's claim on the one hand and the statute which is expressly applicable to a *contract* on the other, is present. And, in a more candid moment, petitioner confessed that:

> "Without the *Mexican Federal Labor Law* the Plaintiff admittedly would have no cause of action. It is *this law* and the beneficial provisions thereof which apply to this plaintiff and *that* creates his cause of action.[7]

Manifestly, the statute relied upon by petitioner is not applicable to the substantive lapsing provisions of the controlling Mexican Labor Law and, consequently, petitioner's public policy argument must fail.

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[6]It should be recalled that there was no written contract between the parties, much less any agreement between them which fixed any period of time within which a suit thereunder could be instituted. The lapsing provision here involved is not a matter of contract but, rather, is the substantive feature of a controlling foreign law.

[7]Page 40 of petitioner's brief filed in the appellate court.

CONCLUSION

It is respectfully submitted that certiorari jurisdiction does not exist and that, therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted

Phillip G. Newcomm

Of Counsel:
SHUTTS & BOWEN
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the within Brief of Respondent in Opposition to Petition for Writ of Certiorari was mailed this_____day of January 1973, to Prunty, Ross & Olsen, Attorneys for Petitioner, 837 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

_____

Phillip G. Newcomm